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No. 97-241

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

ZOLLO DRUM COMPANY, INC. and
NRS CARTING COMPANY, INC.,
Petitioners,

v.

B.F. GOODRICH CO., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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REPLY BRIEF FOR THE PETITIONERS

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QUESTION PRESENTED

Whether federal common law overrides state corporation law limitations on the imposition of successor liability on asset purchasers in cases under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA" or "Superfund"), 42 U.S.C. § 9601 *et seq.*

RULE 29.6 STATEMENT

Petitioners Zollo Drum Company, Inc. and NRS Carting Company, Inc. have no parent companies or subsidiaries.

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---

REPLY BRIEF FOR THE PETITIONERS

The United States concedes that the Question Presented —whether federal common law overrides state law limitations on successor liability in CERCLA cases—"has divided the lower courts." Br. in Opp. 11. And the United States makes no attempt to reconcile the court of appeals' decision to create federal common law with *O'Melveny & Myers v. FDIC*, 512 U.S. 79 (1994) and *Atherton v. FDIC*, 117 S. Ct. 666 (1997). Yet despite the undeniable importance of this issue, the United States suggests, on two bases, that the Court not use this case to resolve

the circuit conflict. Neither reason offered by the United States for denying review withstands scrutiny.

The United States' assertion that the Court grants certiorari prior to final judgment only in "exceptional cases" ignores that the Court did just that in both *O'Melveny & Myers* (with the United States' support) and *Atherton*, and that the United States is itself presently seeking review of a non-final order in a CERCLA case. The fact is this Court often grants certiorari to review court of appeals orders reversing summary judgments and remanding for further proceedings.

The United States' claim that "further factual development" is needed to apply even state law successor liability rules ignores the record in this case. As the district court held, the record evidence mandated summary judgments for petitioners under Connecticut law and the standard of *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). There is no reason to defer review for "further factual development" which would be relevant only to the federal common law successor liability standard legislated by the court of appeals.

The Question Presented is important and recurring. The circuit split has continued after the Court's unanimous decision in *O'Melveny & Myers*, and will persist until the Court intervenes. The Court should resolve this circuit conflict now.

I. THIS IS AN APPROPRIATE CASE FOR RESOLVING THE QUESTION PRESENTED NOW.

A. The United States claims that certiorari is inappropriate because the court of appeals' decision reversed grants of summary judgment, and remanded for further proceedings. According to the United States,

> The Court ordinarily does not grant a writ of certiorari to review interlocutory decisions of the courts of appeals. It takes that step only in the "exceptional

> case" in which the Court's involvement "is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause."

Br. in Opp. 13 (citations omitted).

This view of the Court's certiorari jurisdiction is too narrow. The Court frequently grants certiorari to review court of appeals decisions which reverse summary judgments and remand, where the appellate decisions squarely present important legal issues which would otherwise justify certiorari.

The Court's two most recent decisions unanimously rejecting a general federal common law both illustrate this. In *Atherton v. FDIC*, 117 S. Ct. 666 (1997), the district court dismissed the RTC's claims against a failed financial institutions' directors, officers and employees. The court of appeals reversed and remanded, "direct[ing] the [district] court to permit the RTC to pursue any claims for negligence or breach of fiduciary duty available as a matter of federal common law." *RTC v. Cityfed Fin. Corp.*, 57 F.3d 1231, 1249 (3d Cir. 1995). This Court granted certiorari and reversed, with no mention of "exceptional" circumstances.

In *O'Melveny & Myers v. FDIC*, 512 U.S. 79 (1994), as here, the district court granted summary judgment on the ground that the FDIC's legal malpractice claims were barred under state law. As in this case, the court of appeals reversed and remanded for further proceedings, ruling that federal common law governed the defenses petitioner had asserted. This Court granted certiorari without any reference to an "exceptional" circumstances test. Indeed, the United States *supported* the *O'Melveny* petition, raising no issue about the "interlocutory" nature of the Ninth Circuit's decision.

On numerous additional occasions, this Court has granted certiorari to review court of appeals decisions

which reversed summary judgments [1] or other dispositive rulings [2] and remanded for further proceedings. The Court did not mention a heightened standard for the grant of certiorari in those cases. *See* 17 C. Wright, A. Miller & E. Cooper, *Federal Practice & Procedure* § 4036, at 31-32 & n.57 (2d ed. 1988) ("certiorari has been granted to review many nonfinal dispositions without any further explanation"; citing 18 such cases); R. Stern, E. Gressman, S. Shapiro & K. Geller, *Supreme Court Practice* § 2.2, at 40 (7th ed. 1993); *id.* § 4.18, at 196.

Mazurek v. Armstrong, 117 S. Ct. 1865 (1997) (*per curiam*), on which the United States relies (Br. in Opp. 14), recognizes that "there is no absolute bar to review of nonfinal judgments of the lower federal courts." 117 S. Ct. at 1868. *Mazurek* only referred to "exceptional circumstances" to justify the extraordinary action of *summary reversal* of the court of appeals' decision without merits briefing; the Court's opinion did not suggest such circumstances must exist merely to justify a grant of certiorari.[3]

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[1] *See, e.g., Gilbert v. Homar*, 117 S. Ct. 1807 (1997); *United Air Lines v. McMann*, 434 U.S. 192 (1977); *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355 (1977); *United States v. Orleans*, 425 U.S. 807 (1976); *Abbott Labs. v. Portland Retail Druggists Ass'n, Inc.*, 425 U.S. 1, 5-6 (1976).

[2] *See, e.g., Metro-North Commuter R.R. Co. v. Buckley*, 117 S. Ct. 2113 (1997); *Town of Newton v. Rumery*, 480 U.S. 386, 392 (1987); *School Bd. of Nassau Cty. v. Arline*, 480 U.S. 273, 277 (1987).

[3] The other cases cited by the United States are inapposite. In *Brotherhood of Locomotive Firemen v. Bangor & Aroostock R.R.*, 389 U.S. 327, 328 (1967) (*per curiam*), the Court denied certiorari on the petition of parties held in contempt by the district court, where the court of appeals "remanded to the District Court to consider whether there had in fact been a contempt"; the decision states no general rule limiting certiorari jurisdiction. *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251 (1916), merely held that denial of an earlier, interlocutory petition for certiorari did not limit the scope of the Court's review on a later petition following final judgment. *Id.* at 258. Finally, *American Construc-*

In contrast to its position here, the United States is *presently seeking certiorari* from an appellate decision which resolved legal issues under CERCLA, and remanded to the district court for further factual findings. *See* Petition for a Writ of Certiorari at 14 n.4, *United States v. CPC Int'l, Inc.*, No. 7-454 (filed Sep. 10 1997). It is this petition to which the United States argues this case should defer. Br. in Opp. 18.[4]

In this case, as in *Atherton* and *O'Melveny*, a district court dismissed an action on state law grounds, and the court of appeals reversed and remanded for further proceedings necessary only under a federal common law standard of liability created by the court of appeals. As in *Atherton* and *O'Melveny*, the considerations generally governing this Court's certiorari jurisdiction support review. As in *Atherton* and *O'Melveny*, the Petition should be granted; no further showing of "exceptional" circumstances is necessary.

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tion Co. v. Jacksonville, T. & K. W. Ry. Co., 148 U.S. 372 (1893), was decided when certiorari had been granted in only two prior cases. *Id.* at 384. In light of the modern cases discussed in the text, any restrictions on certiorari suggested by *American Construction* have been modified or limited by more than a century's experience administering the Court's certiorari docket.

[4] The United States successfully argued that a remand for further proceedings did *not* prevent review in *United States v. Orleans*, 425 U.S. 807 (1976):

> The judgment below is interlocutory in the sense that the case has been remanded for further proceedings, *but it is a final determination of the legal issue presented here, which will control future litigation in the Sixth Circuit.* Accordingly, the nonfinality of the judgment below does not bar certiorari review. See, *e.g., Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 685, n.3; *Land v. Dollar*, 330 U.S. 731, 734, n.2.

Petition for Certiorari at 10 n.8 (filed Aug. 1975) (emphasis added).

B. A single sentence from the Brief in Opposition captures the other principal basis on which the United States opposes certiorari:

> [A]s the court of appeals indicated, the resolution of successor liability issues in this case will require additional factual development *regardless of the standard employed.*

Br. in Opp. 16 (emphasis added); *see also id.* at 18 n.8.[5]

The United States' contention that the district court did not have an adequate factual record to resolve the successor liability issue, *even under the state-law standard the district court applied*, is simply incorrect. In fact, the "further factual development" the Second Circuit required is relevant *only* under the "federal common law" successor liability standard that court created, and does not justify deferring review. The district court had before it all of the evidence necessary to resolve the successor liability claims under Connecticut law, and it correctly did so.[6]

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[5] The United States also argues that the decision below is unsuitable for review because "the district court imposed significant restrictions on discovery," and "granted summary judgment on successor liability without allowing any substantial development of the underlying facts." Br. in Opp. at 16. However, the private respondents challenged the district court's limitations on discovery on appeal, and the Second Circuit rejected these arguments. *See* Pet. App. 29a-31a. No cross-petition has been filed raising this issue.

[6] The United States also suggests "further factual development" is necessary to elucidate "the facts relevant to the appropriate choice of law." Br. in Opp. 18 n.8. However, the district court properly applied Connecticut law here, since no party suggested otherwise. *See, e.g., Stanford v. Kuwait Airways Corp.*, 89 F.3d 117, 122 (2d Cir. 1996); *Tehran-Berkeley Civ. & Env. Eng'rs v. Tippetts-Abbett-McCarthy-Stratton*, 888 F.2d 239, 242 (2d Cir. 1989). In any event, the site is located in Connecticut, the asset purchase transactions occurred in Connecticut, and all of the relevant entities were incorporated and headquartered in Connecticut; the district

Under Connecticut law, "[a] sale of assets by one corporation to another, in good faith and for valuable consideration, does not impose any liability on the buyer for the debts of the seller." *Ricciardello v. J.W. Gant & Co.*, 717 F. Supp. 56, 59 (D. Conn. 1989), citing *Davis v. Hemming*, 101 Conn. 713, 725, 127 A. 514, 518 (1925).

The Connecticut courts have repeatedly held that "[t]he key element" necessary to establish an exception to this general rule "is a common identity of the * * * stockholders in both the selling and purchasing corporations." *National Grange Mut. Ins. Co. v. Montgomery Elev. Co.*, No. CV-91-0501948S, 1994 WL 547747, at *3 (Conn. Super. Sep. 22, 1994).[7] In fact, the Connecticut courts have specifically rejected the "substantial continuity" theory adopted by the Second Circuit *because this test eliminates the continuity of shareholders requirement. Sullivan v. A.W. Flint Co.*, 1996 WL 469716, at *5.

As the district court held, the record entitled both petitioners to summary judgment under Connecticut's successor liability rules.[8] The record—which includes the asset purchase agreements, relevant corporate documents, and testimony and affidavits of principals of the asset buyers and sellers—reveals both transactions were cash-for-assets exchanges, and in both cases there is no overlap between the shareholders of the asset seller and purchaser.[9]

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court's application of Connecticut law is justifiable without "further factual development."

[7] *Accord, Ricciardello*, 717 F. Supp. at 58; *Sullivan v. A.W. Flint Co.*, No. CV92 0339263, 1996 WL 469716, at *5 (Conn. Super. Aug. 5, 1996); *Copperthite v. Pytlik*, No. 59053, 1992 WL 209660, at *3 (Conn. Super. Aug. 25, 1992) ("A continuation envisions a common identity of directors [and] shareholders * * *.").

[8] Indeed, respondents failure to submit *any* evidence in response to NRS Carting's motion arguably would have justified summary judgment even on the expansive federal common law theory adopted by the court below.

[9] The United States also argues that "the district court itself acknowledged that the factual record respecting [petitioner Zollo

II. THE QUESTION PRESENTED IS IMPORTANT AND RECURRING, AND HAS EVENLY DIVIDED EIGHT COURTS OF APPEALS.

The United States acknowledges that "the issue [presented by the Petition] has divided the lower courts," Br. in Opp. 11, and that the Second Circuit's ruling in this case is in conflict with decisions of the Sixth Circuit, and "in tension" with the Eleventh Circuit's decision in *Redwing Carriers v. Saraland Apartments,* 94 F.3d 1489 (11th Cir. 1996). Br. in Opp. 12. Despite the United States' caviling (Br. in Opp. 12 n.7), the decision below also conflicts with *United States v. Cordova Chem. Co.,* 113 F.3d 572 (6th Cir. 1997) (*en banc*), and with *Joslyn Mfg. Co. v. T.L. James & Co.,* 893 F.2d 80 (5th Cir. 1986), each of which refused to use federal common law to expand parent corporation liability under CERCLA. *See* Pet. 11-13.

The United States downplays the importance and frequent recurrence of the Question Presented. But a survey provided to the Second Circuit (and reproduced in an appendix to this brief) identifies 67 Superfund cases addressing successor liability issues as of December 1996. Nine additional CERCLA successor liability cases not reflected in that survey have now been decided.[10] The

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Drum] was limited." Br. in Opp. at 16 (citing Pet. App. 82a). Yet the district court's recognition that "[s]tock ownership, officerships and directors have not otherwise been put in the record," (*id.*), is simply an acknowledgment that summary judgment was justified because respondents (who had the burden of proof), had failed to provide any evidentiary material in opposition to Zollo's motion. *See Celotex Corp. v. Catrett,* 477 U.S. 317, 322-23 (1986). The United States cannot use *respondents'* failure to satisfy their obligations under Fed.R.Civ.P. 56 as a basis to defeat this Court's review.

[10] *United States v. Iron Mountain Mines, Inc.,* No. CIV-S-91-768 (E.D. Cal. Sep. 30, 1997); *Chrysler Corp. v. Ford Motor Co.,* 972 F. Supp. 1097 (E.D. Mich. 1997); *Cooper Indus., Inc. v. Agway Inc.,* No. 92-0748, 1997 WL 275075 (N.D.N.Y. May 19, 1997); *North Shore Gas Co. v. Salomon Inc.,* 963 F. Supp. 694 (N.D. Ill. May 5, 1997); *Ekotek Site PRP Comm. v. Self,* 948 F. Supp. 994 (D. Utah

United States' contention that the Petition "presents a less pressing issue than the question of parent corporation liability" which the United States has raised in another case (Br. in Opp. 18) is unsupported and inaccurate.[11]

Finally, the United States argues the Court should permit the lower courts further opportunity "to refine their views" in light of the Court's decision, more than three years ago, in *O'Melveny & Myers v. FDIC*, 512 U.S. 79 (1994). Yet the court below specifically held that its decision to create federal common law was consistent with *O'Melveny*, and the United States acknowledges that this decision conflicts with two other post-*O'Melveny decisions*. Br. in Opp. 12 (noting that decision below conflicts with *City Mgmt. Corp. v. U.S. Chem. Co.*, 43 F.3d 244, 250 (6th Cir. 1994), and with *Redwing Carriers v. Saraland Apts.*, 94 F.3d 1489, 1500-02 (11th Cir. 1996)). It is clear that *O'Melveny*, alone, has not resolved this conflict; the conflict will persist

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1996); *PMC Inc. v. The Sherwin-Williams Co.*, No. 93 C 1379 (N.D. Ill. Sep. 24, 1996). Indeed, these later decisions show that the opinion below is affecting decisions on CERCLA successor liability in other circuits. *Arizona v. Esco*, No. 93-0937, 1997 WL 259520 (D. Ariz. March 26, 1997); *A-C Reorg. Trust v. E.I. duPont de Nemours & Co.*, No. 94-574, 1997 WL 381962 (E.D. Wis. March 10, 1997); *Gould Inc. v. A&M Battery & Tire Serv.*, 950 F. Supp. 653 (M.D. Pa. 1997).

[11] The United States suggests the Court should first resolve the parent corporation liability issue presented by the pending certiorari petitions in *MDEQ v. CPC International, Inc.*, No. 97-296 (filed Aug. 8, 1997), and *United States v. CPC International, Inc.*, No. 97-454 (filed Sept. 10, 1997). *See* Br. in Opp. 18. But resolution of the narrow issue of statutory construction presented by the *CPC International* petitions will have little relevance to the issue presented in this case—whether creation of a federal common law of corporate successor liability is appropriate. Although the Sixth Circuit's decision in *Cordova Chemical*, 113 F.3d 572 (which is the subject of the *CPC International* petitions), refused to create a federal common law of parent corporation liability under CERCLA, the Petitions filed by the State of Michigan and by the United States do not directly challenge that ruling.

until this Court intervenes, yet again, to restrain "the runaway tendencies of 'federal common law' untethered to a genuinely identifiable * * * federal policy." 512 U.S. at 89.[12]

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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[12] *See* G. Sisk & J. Anderson, *The Sun Sets on Federal Common Law: Corporate Successor Liability under CERCLA After O'Melveny & Myers*, 16 Va. Envtl. L.J. 505, 551-52 (1997) ("the Second Circuit's decision [in this case] indicates that Supreme Court review will likely be required to lay to rest judicial inventiveness through federal common law under CERCLA").

APPENDIX

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Addendum to the Memorandum of *Amicus Curiae* Browning-Ferris Industries, Inc. in Support of Petition for Rehearing with Suggestion for Rehearing En Banc of Defendants-Appellees NRS Carting Company, Inc. and Zollo Drum Company, Inc. (2d Cir. filed Dec. 12, 1996)

Based on a search of the Westlaw "Allfeds" database (which includes cases from all federal courts) on December 8, 1996, issues of corporate successor liability under the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9601 *et seq.*, were raised in all of the following cases. This listing does not include the two cases involved in this appeal which raise successor liability issues.

I. *Court of Appeals Decisions*

Atchison, T. & S.F. Ry. Co. v. Brown & Bryant, Inc., No. 96-15529 (9th Cir. currently pending)

City Mgmt. Corp. v. U.S. Chem. Co., 43 F.3d 244 (6th Cir. 1994)

John S. Boyd Co. v. Boston Gas Co., 992 F.2d 401 (1st Cir. 1993)

United States v. Mexico Feed & Seed Co., 980 F.2d 478 (8th Cir. 1992)

United States v. Carolina Transformer Co., 978 F.2d 832 (4th Cir. 1992)

Anspec Co. v. Johnson Controls, Inc., 922 F.2d 1240 (6th Cir. 1991)

Louisiana-Pac. Corp. v. Asarco, Inc., 909 F.2d 1260 (9th Cir. 1990)

Smith Land & Imp. Corp. v. Celotex Corp., 851 F.2d 86 (3d Cir. 1988)

II. *District Court Decisions*

Browning-Ferris Indus. of Ill., Inc. v. Ter Maat, No. 92 C 20259, 1996 WL 535539 (N.D. Ill. Sep. 19, 1996)

United States v. Keystone Sanitation Co., No. 1:CV-03-1482 (M.D. Pa. Aug. 22, 1996)

State of N.Y. v. Panex Indus., Inc., No. 94-CV-0400E(H), 1996 WL 378172 (W.D.N.Y. June 24, 1996)

State of Wash. v. United States, 930 F. Supp. 474 (W.D. Wash 1996)

Ninth Ave. Remedial Group v. Allis-Chalmers Corp., 195 B.R. 716 (N.D. 1996)

Stone & Webster Mgmt. Consultants, Inc. v. Travelers Indem. Co., No. 94 Civ. 6619 (RPP), 1996 WL 180025 (S.D.N.Y. Apr. 16, 1996)

Pinal Creek Group v. Newmont Mining Corp., 926 F. Supp. 1400 (D. Ariz. 1996)

City of Toledo v. Beazer Materials & Servs., Inc., 923 F. Supp. 1001 (N.D. Ohio Jan. 22, 1996)

Allwaste Env. Servs./North Atl., Inc. v. Pastore, 911 F. Supp. 29 (D. Me. 1996)

Elf Atochem North Amer. v. United States, 908 F. Supp. 275 (E.D. Pa. 1995)

United States v. Atlas Minerals & Chems., Inc., No. Civ. A. 91-5118, 824 F. Supp. 46, 1993 WL 482952, 1995 WL 510304, (E.D. Pa. Mar. 5, 1993, Sep. 11, 1993, Aug. 22, 1995)

Plaskon Electronic Matls., Inc. v. Allied-Signal, Inc., 904 F. Supp. 644 (N.D. Ohio 1995)

Bethlehem Iron Works, Inc. v. Lewis Indus., Inc., No. Civ. A. 94-0752, 1995 WL 376479 (E.D. Pa. June 20, 1995)

United States v. Pierce, Nos. 83-CV-1623, 91-CV-0039, 92-CV-0562, 1995 WL 356017 (N.D.N.Y. Feb. 21, 1995)

Blackstone Valley Elec. Co. v. Stone & Webster, Inc., 867 F. Supp. 73 (D. Mass. 1994)

State of N.Y. v. N. Storonske Cooperage Co., 174 B.R. 366 (N.D.N.Y. 1994)

Chicago Cutlery, Inc. v. Hurlin, No. C-93-527-JD, 1994 WL 605739 (D.N.H. Oct. 31, 1994)

Kleen Laundry & Dry Cleaning Servs., Inc. v. Total Waste Mgmt., Inc., 817 F. Supp. 225 (D.N.H. 1993, and 867 F. Supp. 1136 (D.N.H. 1994)

Hunt's Generator Comm. v. Babcock & Wilcox Co., 863 F. Supp. 879 (E.D. Wis. 1994)

United States v. Vermont Am. Corp., 871 F. Supp. 318 (W.D. Mich. 1994)

United States v. Lang., 864 F. Supp. 610 (E.D. Tex. 1994)

Gould, Inc. v. Alter Metal Co., No. 91 C 20371, 1994 WL 406576 (N.D. Ill. Aug. 1, 1994)

Northwestern Mut. Life Ins. Co. v. Atlantic Res. Corp., 847 F. Supp. 389 (E.D. Va. 1994)

Atlantic Richfield Co. v. Blosenski, 847 F. Supp. 1261 (E.D. Pa. 1994)

Charter Township of Oshtemo v. American Cyanamid Co., 876 F. Supp. 934 (W.D. Mich. 1994)

Analytical Measurements, Inc. v. Keuffel & Esser Co., 843 F. Supp. 920 (D.N.J. 1993)

Interstate Power Co. v. Kansas City Power & Light Co., 909 F. Supp. 1241 (N.D. Iowa 1993)

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Mesiti v. Microdot, Inc., 156 B.R. 113 (D.N.H. 1993)

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